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No. 90-1887

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In The

Supreme Court of the United States

October Term, 1990

STATE OF CONNECTICUT,

Petitioner,

v.

DAVID MOONEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

REPLY BRIEF OF PETITIONER

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A. Recent Decisions: This Court recently issued two opinions that demonstrate that the Connecticut Supreme Court wrongly interpreted Fourth Amendment principles. *California v. Acevedo,* 59 U.S.L.W. 4559 (1991) and *Florida v. Jimeno,* 59 U.S.L.W. 4471 (1991). These recent opinions were released just prior to the filing of the petition and are not cited therein. The opinions are discussed in the respondent's Brief in Opposition at pages 25-26.

1. California v. Acevedo

In *Acevedo* this Court reaffirmed the warrantless search of an automobile, *Carroll v. United States,* 267 U.S. 132 (1925), and closed containers encountered in the automobile during such a search, *United States v. Ross,* 456 U.S. 798 (1982). The Court concomitantly eliminated the warrant requirement for closed containers in automobiles as set forth in *Arkansas v. Sanders,* 442 U.S. 753 (1979), and *United States v. Chadwick,* 433 U.S. 1 (1977). The Court noted that the distinction between a container for which the police were specifically searching and a container they came across while examining the interior of a car "provided only minimal protection for privacy and [had] impeded effective law enforcement." 59 U.S.L.W. at 4562.

Although the respondent dismisses *Acevedo* as an "automobile exception" case and thus irrelevant, the analysis therein actually strengthens the petitioner's argument. *Acevedo* recognizes that the place or location of the closed container is an important factor in determining the degree of protection it merits under the Fourth Amendment. *Accord, United States v. Ross,* 456 U.S. at 823. If no warrant is required for a search of a closed container in an automobile in which the Court has recognized a

privacy interest, *Cardwell v. Lewis,* 417 U.S. 583 (1974); then no warrant was required for the search of closed containers found during a search of the open and public area at the bridge abutment, in which the respondent had no protected privacy interest. *Oliver v. United States,* 466 U.S. 170 (1984). *Acevedo* further underscores the analytical error of the Connecticut Supreme Court in isolating the closed containers from the circumstances in which they were found, an error solidly rooted in the now discredited *Chadwick-Sanders* doctrine.

In a concurring opinion to *Acevedo* Justice Scalia joined the majority

> not because a closed container carried inside a car becomes subject to the "automobile" exception to the general warrant requirement, but because the search of a closed container, outside of a privately owned building, with probable cause to believe that the container contains contraband, . . . is not one of those searches whose Fourth Amendment reasonableness depends upon a warrant.

59 U.S.L.W. at 4565. As Justice Scalia recognizes, the principle of *Acevedo* applies to closed containers in general, so that depending on the location of a container the Fourth Amendment may not demand a warrant as a prerequisite to a search. *See, e.g., New Jersey v. T.L.O.,* 469 U.S. 325 (1985). Thus, even if the examination of the cardboard box and the duffle bag in the present case is deemed a search under the Fourth Amendment, no warrant was required.[1]

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[1] In his brief in opposition the respondent alludes several times to an alleged lack of probable cause to search. *See* Brief

(continued)

2. Florida v. Jimeno

This Court held in *Jimeno* that it was objectively reasonable for police to believe that a suspect's consent to search an automobile extended to the closed container found in the car, where the suspect did not place any limitation on his general consent to search. The police had informed the suspect that they believed he was carrying narcotics in his car, and obtained his permission to search. This Court, noting that "[t]he scope of a search is generally defined by its expressed object" concluded that a reasonable person would "know that narcotics are generally carried in some form of container." 59 U.S.L.W. at 4472 (citing *Ross*). Therefore the suspect should have known when he consented to the search for drugs that the police would open closed containers they found in the car. The Court rejected Jimeno's argument that the police were required to obtain separate permission to search each container they encountered in the car, where Jimeno had not expressly limited the scope of the consent search.

The importance of *Jimeno* to the present case is its recognition that where closed containers lie within the

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[1] *(continued)*
in Opposition at p.5 (two references to absence of probable cause to search); *see also* p.15 (alleging that petitioner never claimed, nor did trial court find, probable cause). The trial court upheld the state's challenge to the respondent's privacy interest, and held that the Fourth Amendment did not apply. The state supreme court expressly stated that the issue of probable cause was not before it. *See* Appendix to Petition at A19, n.11. Because the issue of probable cause was never considered by the state courts, it is not implicated by the petition for certiorari to this Court.

scope of a warrantless search, their contents may be examined without a warrant. In the present case, the cardboard box and duffle bag were discovered by the police in the course of their search of the bridge abutment area for evidence of the homicide-robbery. While the focus of their search was the open area, it was reasonable for the police to assume that evidence might well be enclosed in containers of some sort, as well as lying strewn upon the ground in the open area.

Jimeno, like *Acevedo,* supports the petitioner's argument that the Connecticut Supreme Court erred in ascribing a heightened degree of privacy to the closed containers, so that a warrant was required to examine their contents. The state supreme court's decision conflicts with these recent precedents.

B. Jurisdiction: The respondent contests jurisdiction on the procedural ground that the petition allegedly fails to comply with Supreme Court Rule 14(h). The petition adequately explains that the trial court and the state supreme court based their conclusions on federal grounds, *i.e.* what constitutes a reasonable expectation of privacy under the Fourth Amendment. This Court has jurisdiction to consider the case.

The petitioner's statement of the case adequately complies with the requirements of Rule 14(h). The petition summarizes the nature of the state court proceedings, *i.e.* that the respondent was convicted of murder and robbery in the trial court and subsequently appealed to the Connecticut Supreme Court from the denial of his motion to suppress evidence, Petition at 3-4; and it sets forth the

substance of the trial court's denial of the motion to suppress on grounds that the respondent had no reasonable expectation of privacy in the area of the search or in the items which he had left unattended there. Petition at 6. The opinion of the Connecticut Supreme Court regarding the Fourth Amendment suppression issue is analyzed on pages 6-8 of the petition, with references to specific portions of that opinion which is set forth in its entirety in the Appendix.

Respectfully submitted,

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